(1)
Supreme Court, U.S.
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No. 03 420

In the Supreme Court of the United States

J.V.D.B. & ASSOCIATES, INC.,
AN ILLINOIS CORPORATION,
Petitioner,

v.

AMANDA HORKEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Seventh Circuit Court of Appeals err in affirming the District Court's decision to grant Respondent's Motion for Summary Judgment as to 15 U.S.C. Section 1692c(a)(3) when Petitioner's representative made a second telephone call to Respondent' s place of employment although there is nothing in the record stating that Petitioner knew or had reason to know that Respondent's employer prohibited Respondent from receiving such communication?

2. Did the Seventh Circuit Court of Appeals err in affirming the District Court's decision to grant Respondent's Motion for Summary Judgment as to 15 U.S.C Section 1692d(2) when Petitioner's representative is alleged to have told a third party to "tell Amanda to quit being such a fucking bitch" in spite of the fact that the District Court found that Respondent's debt was not discussed with a third party in this telephone call and Petitioner's representative did not disclose to the third party the purpose of the telephone call?

PARTIES TO THE PROCEEDINGS

Including the parties named in the caption of this Petition, the parties are:

Petitioner: J.V.D.B. & Associates, Inc., a nongovernmental corporate party to the proceedings before United State District Court for the Northern District of Illinois, Eastern Division, and the United States Court of Appeals for the Seventh Circuit.

Respondent Amanda Horkey is an individual.

DISCLOSURE PURSUANT TO SUPREME COURT RULE 29.6

J.V.D.B. & Associates, Inc., here discloses that it is an Illinois company, that there are no parent corporations to J.V.D.B. & Associates, Inc., and that there are no publicly held companies which own 10% or more of J.V.D.B. & Associates, Inc.'s stock.

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J.V.D.B. & Associates, Inc., respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the Seventh Circuit is reported at 333 F.3d 769 (7th Cir. 2003) and is reproduced in App. A. The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, is reproduced in App. B. The Minute Order and Judgment of the United States District Court for the Northern District of Illinois, Eastern Division, are reproduced in App. C and D.

JURISDICTION

The Opinion of the United States Court of Appeals for the Seventh Circuit was issued on June 20, 2003. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED IN THE CASE

15 U.S.C. § 1692c(a)3: Communication in connection with debt collection:

(a) Communication with the consumer generally

> Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with the consumer in connection with the collection of any debt—

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

15 U.S.C. § 1692d(2) **Harassment or abuse**

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(2) The use of obscene or profane language the natural consequence of which is to abuse the hearer or reader.

STATEMENT OF THE CASE

Between September 18, 1999, and November 15, 1999, Respondent, Amanda Horkey n/k/a Amanda Blum and her two minor children received dental services from one Dr. Marcos Y. Que at his dental clinic, Renwick Family Dental Care, L.L.C. After insurance payments, the balance of the bill of $817.00 remained unpaid. In December,2000, Dr. Que referred the matter to Petitioner J.V.D.B. & Associates, Inc., a licensed Illinois collection agency and a debt collector under the Fair Debt Collection Practice Act. (F.D.C.P.A.)

On December 21, 2000, Petitioner's attorney, Paul D. Lawent, sent a debt validation letter to Respondent, a letter Respondent denies receiving. On January 9, 2001, a

representative of Petitioner called Respondent regarding payment of this $817.00 dental bill.

According to her affidavit filed with her motion for summary judgment in this matter, Respondent first discussed the bill with defendant's representative. After Petitioner's representative and Respondent attempted to negotiate a payment plan, Respondent almost as an after thought, said "I then told Romero that I could not talk to him at work and asked him to give me his telephone number so I could call him back from my home to set up a payment schedule." No where in Respondent's affidavit does it state that Respondent told Petitioner's representative that her employer prohibited her from receiving such communications at work.

A short time later on January 9, 2001, Petitioner's representative placed a second telephone call to Respondent, but Respondent did not answer her phone. Ms. Horkey's telephone was answered by a co-worker, Ms. Jimmie Scholes, who told Petitioner's representative that Ms. Horkey was unavailable. At this time, Ms. Scholes alleged Petitioner's representative said "tell Amanda to quit being such a fucking bitch." Magistrate Judge Levin found that there was no communication regarding Ms. Horkey's debt to Ms. Scholes but found that the alleged language violated the F.D.C.P.A.

At the trial on damages on July 29,2002, Magistrate Judge Levine awarded the maximum statutory damages $1,000.00 based on three violations. Although Magistrate Judge Levin did not expressly state this motivation in awarding $350.00 in actual damages, it appears from his statements at page 33 of the transcript that language alleged by Defendant's representative when he spoke to Ms. Scholes was the reason for the actual damage award.

The Seventh Circuit entered its decision on June 20, 2003, affirming the District Court's Order granting Summary Judgment for Plaintiff.

REASONS FOR GRANTING THE WRIT

There are no Supreme Court decisions on either section and it appears that the Seventh Circuit Court of Appeals has rewritten each section of the Fair Debt Collection Practices Act which are in dispute.

1. **The Court must determine whether a simple statement that the consumer could not talk to the debt collector at work, without any indication that the debt collector knew or had reason to know that the consumer's employer prohibited the consumer from receiving such communication is sufficient to violate 15 U.S.C. § 1692c(a)(3) of the Fair Debt Collection Practices Act.**

To violate Section 15 U.S.C. 1692c(a)(3), the section specifically requires that the debt collector know or have reason to know that the consumer's employer prohibits the consumer from receiving such communication. In this case, the Respondent merely stated that she could not talk to him at work. If this is all that is needed to prohibit the debt collector from making a second call at Petitioner's place of employment, it would appear that Congress' intent is circumvented. More than just this simple statement should be necessary to demonstrate that the employer prohibited this type of communication at work.

The Seventh Circuit, in its opinion, places the burden on the debt collector to investigate any mention of not taking

calls at work as a violation of the section and further states that unsophisticated consumers, whatever else may be said about them, cannot be expected to assert their Section 1692c(a)(3) rights in legally precise phrases. The Court went on to state "It is therefore enough to put debt collectors on notice under Section 1692c(a)(3) when a consumer states in plain English that she cannot speak to the debt collector at work."

If this conclusion by the Seventh Circuit is the law, 15 U.S.C. § 1692c(a)(3) is rendered meaningless. Congress could simply have written: (3) at the consumer's place of employment if so requested by the consumer.

Petitioner's position is that the least sophisticated consumer doctrine does not apply here. That doctrine is appropriate when the consumer is interpreting a debt collector's 1692g debt validation letter. But in this case, an oral statement made by a consumer to the debt collector should give the debt collector some indication that the employer prohibits the communication. The Seventh Circuit has rewritten the law with its interpretation and has removed from the law protections granted the debt collector by Congress.

This case is distinguished from *United States v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370, 388 (N.D. Tex. 1986), cited by the Seventh Circuit, as in that case, the consumer specifically wrote in her protest that she not be called at work. In this case, the consumer, Ms. Horkey, first discussed the debt and then, almost as an afterthought, said that she could not talk at work.

2. **The Court must determine whether an apparent off color remark by the debt collector, made to a third party who did not know why the individual was calling, is sufficient to violate 15 U.S.C. § 1692d(2) of the Fair Debt Collection Practices Act.**

To violate Section 15 U.S.C. 1692d(2), the Respondent must show that the natural consequence of any obscene or profane language is to harass, oppress or abuse any person in connection with the collection of a debt and that the use of the obscene or profane language is to abuse the hearer or reader. None of this was shown in this case.

When told that Respondent was unavailable when Petitioner's representative called, Petitioner's representative apparently made a comment out of frustration to the third patty, but the comment was not used in connection with the collection of a debt nor meant to abuse the hearer or reader. Nothing in the record shows that that language was anything more than an "off the cuff remark."

In his decision of January 4, 2002, the Magistrate Judge found the allegation that Petitioner violated 1692c(b) of the Act to be meritless, In the second call by the debt collector, there was no discussion of the debt with the third party. The Circuit Court cited no cases in rendering its decision on 1692d(2), but simply said that—in leaving his message—he was telling her crudely but specifically, to be more receptive to his entreaties regarding the debt.

Again, the Seventh Circuit has attempted to remove a protection from the debt collector. The statute specifically states that the use of obscene or profane language must abuse the hearer or reader. There was no showing of this important

element in this case, only that the language was used and heard by a third party who did not know that the caller was a debt collector.

CONCLUSION

The Supreme Court should grant the writ to define what is necessary to prove a violation of these Sections of the Fair Debt Collection Practices Act as there are no Supreme Court cases on either section, Sections 1692c(a)(3) and 1692d(2).

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-3283

[Filed June 20, 2003]

AMANDA HORKEY,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
J.V.D.B. & ASSOCIATES, INC.,	)
AN ILLINOIS CORPORATION,	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 01 C 1034
Ian H. Levin, Magistrate Judge

Before: EASTERBROOK, MANION, and DIANE P. WOOD, Circuit Judges.

OPINION

MANION, *Circuit Judge*. Chris Romero, an employee of J.V.D.B. & Associates, Inc., a debt collection agency, attempted by telephone to collect a client's debt from Amanda

Horkey while she was at work. Horkey asked him to give her a number she could call from her home. When he refused she hung up. Romero made a second call and left a profane message with Horkey's coworker. Horkey sued under the *Fair Debt Collection Practices Act*. J.V.D.B. appeals from the district court's entry of summary judgment in favor of Horkey, the denial of its motion for attorney's fees, and the awarding of statutory and compensatory damages in Horkey's favor. For the reasons set forth below, we affirm in all respects.

I.

J.V.D.B. is a debt collection agency whose employee, identifying himself as Chris Romero, telephoned Amanda Horkey at her place of employment at least twice on January 9, 2001. In the first call, Romero demanded immediate payment of a debt of $ 817.00. Horkey told Romero that she could not talk to him at work and that she could call him back from her home and arrange a payment schedule. Romero, however, refused to end the conversation, so Horkey hung up on him. Shortly thereafter, Romero called back and spoke with Horkey's coworker, Jimmie Scholes. When Scholes told Romero that Horkey was away from the office and asked if Romero wished to leave a message, Romero told Scholes to "tell Amanda to quit being such a [expletive] bitch," and Romero then hung up the telephone. Scholes passed on the message to Horkey. Shortly after that, Horkey received a third telephone call, but the caller hung up when she answered.

Horkey brought suit under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et seq. She

alleged the following claims: (1) a violation of § 1692c(a)(3)'s prohibition on contacting the consumer at work in contravention of the employer's policy against such communication; (2) a violation of § 1692c(b)'s limits on contacting a third party about the consumer's debt; (3) a violation of § 1692d's prohibition of obscene or profane language; and (4) a violation of § 1692g's requirement of a validation notice. On January 4, 2002, the district court granted summary judgment in Horkey's favor on all claims except for her § 1692c(b) allegation. In later proceedings, the district court granted J.V.D.B.'s motion for summary judgment as to § 1692c(b) (third-party contact), but denied J.V.D.B.'s motion for attorney's fees pursuant to § 1692k(a)(3), which allows a defendant to recover sanctions for an action brought in bad faith and for the purpose of harassment. Ultimately, after a bench trial on the issue of damages, the district court awarded Horkey $ 1,000 in statutory and $ 350.00 in actual damages. J.V.D.B. appeals summary judgment as to Horkey's claims under § 1692c(a)(3) and § 1692d, the district court's denial of its motion for attorney's fees, and the district court's award of statutory and actual damages.

II.

This court reviews the district court's grant of summary judgment *de novo*, construing all facts in favor of J.V.D.B., the nonmoving party. *Rogers v. City of Chicago*, 320 F.3d 748, 752 (7th Cir. 2003). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Fed. R. Civ. P. 56(c). Thus, "summary judgment is appropriate if, on the record as a whole, a rational trier of fact could not find for the non-moving party." *Rogers*, 320 F.3d at 752.

The first issue on appeal is whether summary judgment in Horkey's favor was appropriate as to § *1692c(a)(3)*, which provides that

> without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt . . . at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

J.V.D.B. did not have Horkey's prior consent or a court's express permission to communicate with her at work, so the dispositive question is whether it knew or had reason to know that Horkey's employer prohibited such communication.

The only evidence to which Horkey points in support of the district court's conclusion, as a matter of law, that J.V.D.B. knew or should have known that her employer prohibited her from receiving calls from debt collectors is her statement to Romero that she could not talk to him at work and her request for a number she could call from her home. As Horkey paraphrased her protest in her affidavit, she "told Romero that [she] could not talk to him at work and asked him to give [her] his telephone number so that [she] could call

him back from [her] home to set up a payment schedule." J.V.D.B. argues that this statement is susceptible to various interpretations and that Romero therefore was in no position to know that Horkey's employer prohibited her from receiving debtrelated communication at work. The salient question is whether Horkey's statement was clear enough that, as a matter of law, J.V.D.B. knew or had reason to know that Horkey's employer prohibited her from receiving Romero's call at work.

We agree with the district court that it was. Horkey informed Romero that she could not discuss her debt while at work, and J.V.D.B. presents no evidence that Horkey's employer did allow her to take debt-related calls. Therefore we conclude that in this instance Romero had reason to know that Horkey's employer prohibited her from receiving communications related to debt collection while at work. *See United States v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370, 388 (N.D. Tex. 1986), *aff'd as modified*, 823 F.2d 880 (5th Cir. 1987) (holding that, after the consumer wrote the debt collector and "requested in writing that he not call her at work," further calls violated § 1692c(a)(3)).

It is true, as J.V.D.B. argues, that saying "I cannot talk with you at work" could conceivably be understood to mean something other than "my employer forbids me from talking with you at work." It could, for example, mean "I do not wish to talk with you at work" or "I am too busy to talk with you at work." But this observation does not create an issue of material fact because, as we observed in *Gammon v. GC Servs. Ltd. P'Ship*, 27 F.3d 1254 (7th Cir. 1994), the FDCPA exists to protect the unsophisticated consumer. *Id.* at 1257. Unsophisticated consumers, whatever else may be said about

them, cannot be expected to assert their § 1692c(a)(3) rights in legally precise phrases. It is therefore enough to put debt collectors on notice under § 1692c(a)(3) when a consumer states in plain English that she cannot speak to the debt collector at work. That is what Horkey did. Without evidence that J.V.D.B. knew, contrary to Horkey's assertion, that her employer did not prohibit her from taking debt-related calls at work, she is entitled to summary judgment on her § 1692c(a)(3) claim.

We now turn to Horkey's claim under § 1692d. Section 1692d provides that "a debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. Section 1692d(2), which is the specific subsection upon which the district court granted summary judgment, further provides that "the use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader" is a violation of this section. *Id.* The uncontested evidence is that, within minutes after Horkey told Romero that she could not discuss the debt while at work, Romero called again and left a message with Horkey's coworker, Jimmie Scholes, asking Scholes to "tell Amanda to stop being such a [expletive] bitch." In an attempt to sidestep what would otherwise be a clear violation, J.V.D.B. asserts that Romero's message "was not spoken in connection with a debt collection nor was it meant to abuse the hearer or reader." Each half of this statement is preposterous.

To state the obvious, Romero's message was "in connection with the collection of a debt" because the undisputed evidence is that Romero called Horkey's

workplace for only one reason: to collect a debt. In that context, when he told Horkey (via Scholes) to "stop being such a [expletive] bitch," Romero was not offering general advice about how Horkey could improve her disposition. He was telling her, crudely but specifically, to be more receptive to his entreaties regarding the debt. No other interpretation of the facts is reasonable and thus, as a matter of law, Romero's message to Horkey was "in connection with the collection of a debt."

J.V.D.B.'s assertion that Romero's message was not intended to abuse the hearer likewise fails. J.V.D.B. points to no evidence in the record regarding Romero's intent, which is just as well, because Romero's intent is irrelevant. What is determinative is whether "the natural consequence of" Romero's obscenity-laced message was to "abuse the hearer." 15 U.S.C. § 1692d(2). We need not examine the varying meanings of the words employed to determine that, in the context used, they were abusive as a matter of law. Unequivocally they were. We therefore affirm summary judgment as to Horkey's claim under § 1692d(2).[1]

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[1] J.V.D.B. also points out that Romero "never spoke to" Horkey during his second call, apparently insinuating that there can be no liability under § 1692d(2) where the offending language is routed through an intermediary as opposed to being spoken directly to the consumer. Had the same message been left on Horkey's voicemail, a violation would be conclusive. This is worse because a third person received and relayed the statement. But because J.V.D.B. fails to develop this argument on appeal, the issue is waived. *Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701, 706 n. 4 (7th Cir. 2002).

Next, we consider J.V.D.B.'s third argument, that the district court erred in denying its motion for attorney's fees pursuant to § 1692k(a)(3), which allows a defendant to collect reasonable attorney's fees "on a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment." We review the district court's finding on the issue of bad faith for clear error. *Swanson v. Southern Or. Credit Serv., Inc.*, 869 F.2d 1222, 1229 (9th Cir. 1988). We review the ultimate grant or denial of attorney's fees under § *1692k(a)(3)* for an abuse of discretion. *Zagorski v. Midwest Billing Servs., Inc.*, 128 F.3d 1164, 1166 (7th Cir. 1997). J.V.D.B. contends that Horkey violated § 1692k(a)(3) by bringing a meritless claim under § 1692c(b). Section 1692c(b) states that

> except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

The district court denied summary judgment in Horkey's favor as to § 1692c(b) because it found that there was no evidence that Romero discussed Horkey's debt with Scholes; i.e., in the district court's estimation, Romero's call to Scholes was not "in connection with any debt" and was thus

not actionable under § 1692c(b).[2] Instead, reasoned the court below, Romero's conversation with Scholes "was merely limited to inquiring as to [Horkey's] whereabouts and entailed the use of inappropriate, profane language." Nonetheless, the district court denied J.V.D.B.'s motion for attorney's fees as to this issue because it reasoned that the message Romero left with Scholes "could be construed as sort of in context relating to" the debt that Romero was attempting to collect from Horkey. This is a generous assessment of the foul conversation Romero had with Scholes. But because all of the evidence points to the conclusion that Romero's only reason for calling Horkey's workplace was to collect a debt, we share the district court's assessment of the situation insofar as it held that a reasonable lawyer could have argued from these facts that Romero's abusive conversation with Scholes was in

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[2] Whether the district court's holding that Romero's conversation with Scholes *was not* "in connection with the collection of any debt" under § 1692c(b) is compatible with its holding that the same conversation *was* "in connection with the collection of a debt" under § 1692d is an issue that we need not reach on appeal, because Horkey does not challenge the district court's entry of summary judgment in J.V.D.B.'s favor regarding her claim pursuant to § 1692c(b). Likewise, we need not address whether, as the district court reasoned, a violation of § 1692c(b) requires the debt collector to convey some information about the debt to a third party. At this point, it suffices to say that district courts are split on this question, and that we leave the matter for another day. *Compare Horkey v. J.V.D.B. & Assocs., Inc.*, 179 F. Supp. 2d 861, 868 (N.D. Ill. 2002) (holding that there can be no liability under § 1692c(b) where there is no discussion of the debt), *with West v. Nationwide Credit, Inc.*, 998 F. Supp. 642, 644-45 (W.D.N.C. 1998) (reaching the opposite conclusion).

connection with a debt and therefore triggered liability under § 1692c(b).

We also affirm the denial of J.V.D.B.'s § 1692k(a)(3) motion on an alternate ground. For J.V.D.B. to prevail, it would have to establish that Horkey's "action" was brought in bad faith and for harassing purposes. 15 U.S.C. § 1692k(a)(3). An "action" "in its usual legal sense means a lawsuit brought in a court." Black's Law Dictionary 28 (6th ed. 1990). Thus, J.V.D.B. must show that Horkey's entire lawsuit, and not just her claim under § 1692c(b), was brought in bad faith and to harass J.V.D.B. Although we have not had occasion to delineate what constitutes a lawsuit brought in bad faith and for the purpose of harassment under § 1692k(a)(3), we are confident that no sound concept of such a suit could encompass an action in which the plaintiff wins summary judgment on three of her four asserted claims and has a colorable argument as to the claim on which she ultimately did not prevail. The district court was, accordingly, correct to deny J.V.D.B.'s motion for attorney's fees under § 1692k(a)(3). We cannot fathom how it could have done otherwise. In fact, at this juncture any bad-faith accusations would more appropriately be directed at J.V.B.D. for appealing the denial of its attorney's fees, but that issue is not before us.

Finally, we address J.V.D.B.'s appeal as to the $ 1,000 in statutory damages and $ 350.00 in actual damages. J.V.D.B. predicates its success on the issue of damages on our reversing summary judgment. Because we affirm summary judgment in all respects, J.V.D.B.'s appeal as to damages fails.

III.

For the reasons set forth above, we affirm in all respects.

A true Copy:
Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge: Ian H. Levin

CASE NUMBER: 01 C 1034
DATE: 1/4/2002
CASE TITLE: Horkey vs. J.V.D.B. & Associates Inc.

DOCKET ENTRY:

(5) [X] Status hearing set for 2/7/2002 at 9:30 A.M.

(10) [X] [Other docket entry] **Enter memorandum opinion and order on plaintiff's motion for summary judgment. Plaintiff's motion for summary judgment is granted as to counts II, III and part of count I and denied as to part of count I of the complaint.**

(11) [X] [For further detail see order attached to the original minute order.]

[X] Notices mailed by judge's staff.

Courtroom deputy's initials: SM
Number of notices: 2
Date mailed notice: 1/4/2002
Mailing Deputy initials: SM

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Case No. 01 C 1034

[January 4, 2002, Decided
January 8, 2002, Docketed]

AMANDA HORKEY,	)
Plaintiff,	)
	)
v.	)
	)
J.V.D.B. & ASSOCIATES, INC.,	)
an Illinois corporation,	)
Defendant.	)
	)

JUDGES: IAN H. LEVIN, United States Magistrate Judge.

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiff Amanda Horkey's ("Plaintiff") motion for summary judgment in the cause. For the reasons set forth below, Plaintiff's motion for summary judgment is granted as to Counts II and III and part of Count I and denied as to part of Count I of the Complaint.

BACKGROUND FACTS

Defendant J.V.D.B. & Associates, Inc. ("Defendant") is a debt collector as defined by the Fair Debt Collection

Practices Act ("FDCPA"), 15 U.S.C. § 1692a.[1] (LR 56.1(a) St. P 4.) Plaintiff is an individual from whom Defendant sought to collect a consumer debt owed for dental services. (LR 56.1(a) P 3.)

On January 9, 2001, while Plaintiff was working at A&R Transport (located in San Bernardino, California) there were at least two telephone calls within about twenty minutes of each other from Defendant's employee, Mr. Chris Romero. (LR 56.1(a) St. P 5.) Mr. Romero was contacting Plaintiff to collect on a $ 817.00 consumer debt that she owed to Dr. Marcus M. Que for dental services. (LR 56.1(a) St. P 5.) During the first telephone conversation, Mr. Romero demanded payment from Plaintiff "in full" and "now" for the overdue bill owed to Mr. Que. (LR 56.1(a) St. P 6.) Plaintiff told Mr. Romero that she could not pay the bill in full at that time. (LR 56.1(a) St. P 7.) Mr. Romero informed Plaintiff that she could make two payments. (LR 56.1(a) St. P 7.)

During the first telephone conversation, Plaintiff also told Mr. Romero that she could not speak with him at that time because she was at work. (LR 56.1(a) St. P 7.) Plaintiff asked Mr. Romero for his telephone number so that she could call him back from her home to set up a payment schedule. (LR 56.1(a) St. P 7.) Mr. Romero then began acting rudely and asked Plaintiff for additional personal information. (LR 56.1(a) St. P 8.) Because Mr. Romero refused to listen to

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[1] Defendant is a debt collector pursuant to Section 1692a because it regularly uses an instrumentality of interstate commerce; namely, telephone lines, to collect or attempt to collect consumer debts. 15 U.S.C. § 1692a.

Plaintiff regarding the fact that she was not able to discuss the overdue payment matter while at work, she hung up on him. (LR 56.1(a) St. P 8.) Immediately after hanging up on Mr. Romero, Plaintiff left her office for approximately fifteen minutes. (LR 56.1(a) P 9.)

Mr. Romero, subsequently, called again and spoke with Mr. Jimmie Scholes, one of Plaintiff's co-workers. (LR 56.1(a) St. P P 10, 11.) Mr. Romero asked to speak with Plaintiff, at which time, Mr. Scholes informed Mr. Romero that Plaintiff had stepped away from her office for a few minutes and asked Mr. Romero if he could take a message for Plaintiff. (LR 56.1(a) St. P 11.) Mr. Romero told Mr. Scholes to "tell Amanda to quit being such a fucking bitch" and hung up on him. (LR 56.1(a) St. P 12.) Shortly, after Mr. Scholes informed Plaintiff of Mr. Romero's message, she received another telephone call in which the caller hung up when Plaintiff answered. (LR 56.1(a) St. P 13.) Plaintiff believes that this third telephone call that she received within a twenty minute time span was also from Mr. Romero. (LR 56.1(a) St. P 13.)

Plaintiff never received a written notice from Defendant informing her of her right to receive validation and verification of the debt owed to Mr. Que, as required by Section 1692a of the FDCPA. 15 U.S.C. § 1692a. (LR 56.1(a) St. P 14.) Moreover, on June 28, 2001, Defendant's counsel herein, Paul D. Lawent, produced a copy of a December 21, 2000 initial form debt collection letter on his own attorney letterhead (which had been sent to Plaintiff), seeking to collect on the $ 817.00 debt owed to Mr. Que. (LR 56.1(a) St. P 15.) This letter, which is the only debt collection

letter that was sent to Plaintiff, contains no reference to Defendant. (LR 56.1(a) St. P 15.)

LEGAL STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party had produced evidence to show that it is entitled to summary judgment, the party seeking to avoid such judgment must affirmatively demonstrate that a genuine issue of material fact remains for trial. *LINC v. Fin. Corp. v. Onwuteaka*, 129 F.3d 917, 920 (7th Cir. 1997).

In deciding a motion for summary judgment, a court must "review the record in the light most favorable to the nonmoving party and to draw all reasonable inferences in that party's favor." *Vanasco v. National-Louis Univ.*, 137 F.3d 962, 964 (7th Cir. 1998). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Nevertheless, the nonmovant may not rest upon mere allegations, but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). *See also Linc*, 129 F.3d at 920. A genuine issue of material fact is not shown by the mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, 106 S. Ct. 2505 or by "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Rather, a genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505.

ANALYSIS

I. COUNT III

Plaintiff argues that Defendant failed to provide Plaintiff with a statutorily-required validation notice, in violation of Section 1692g of the FDCPA, in that the notice was sent on Defendant's attorney's letterhead and in no way referenced Defendant. 15 U.S.C. § 1692g. Pl.'s Mem. at 5. Defendant, on the other hand, asserts that Defendant's attorney's letter (of December 21, 2000) was a debt validation notice and, anyway, that any failure by it to provide Plaintiff with the validation notice did not violate Section 1692g of the FDCPA because Defendant did not have Plaintiff's home or work addresses in California. Def.'s Mem. at 2-3. Thus, Defendant argues that, "sending another validation notice would have been a waste of time." *Id.* at 2.

Section 1692g(a) of the FDCPA requires that "within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, . . . send the consumer a written notice containing -- . . . (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector." 15 U.S.C. § 1692g(a)(3). Moreover,

according to Section 809 of the Federal Trade Commission's ("FTC") Official Commentary on the Fair Debt Collection Practices Act, "[a] debt collector's agent may give the notice, as long as it is clear that the information is being provided on behalf of the debt collector." FTC Official Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50097-50110 (Dec. 13, 1988).

The Court agrees with Plaintiff and finds that Defendant failed to provide Plaintiff with the statutorily-required validation notice. Rather, Plaintiff was sent a notice by Defendant's attorney dated December 21, 2000 on the attorney's letterhead, which in no way referenced Defendant and in no way sought to indicate that Defendant's attorney had a business relationship with Defendant or was acting as Defendant's agent when attempting to collect the debt owed by Plaintiff.[2]

In any event, as seen, a debtor has 30 days after receipt of the debt notice to challenge the validity of the debt. Even

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[2] Moreover, there is no allegation or proof by Defendant that its attorney is a "debt collector" under the FDCPA. 15 U.S.C. § 1692a(6). Under the FDCPA, "lawyers can be debt collectors as long as they engage in the business of debt collection." *Jenkins v. Heintz*, 25 F.3d 536, 539 (7th Cir. 1994); *Frey v. Satter, Beyer & Spires, et al.*, 1999 U.S. Dist. LEXIS 6912, 1999 WL 301650, *2 (N.D. Ill. May 3, 1999) ("debt collectors, under the FDCPA, include[] attorneys whose principal business is debt collection or who regularly collect debts of another.") *See generally, Boyd v. Wexler*, 275 F.3d 642, 2001 U.S. App. LEXIS 27262, 2001 WL 1658845 (7th Cir. 2001).

assuming *arguendo* that the December 21, 2000 notice sent from Defendant's attorney can be construed as a validation notice pursuant to Section 1692g, Defendant's demand on January 9, 2001, that Plaintiff pay the bill in full "now" violated the 30-day validation period and therefore, would have overridden and rendered wholly ineffectual any validation notice. *Avila v. Rubin*, 84 F.3d 222, 226 (7th Cir. 1996). *See also Chauncey v. JDR Recovery Corp.*, 118 F.3d 516, 519 (7th Cir. 1997) (demand for payment "within thirty days" violates Section 1692g of the FDCPA); *Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997) (demand for partial payment or suitable arrangements for payment within one week overshadowed the 30-day validation notice); *Jenkins v. Union Corp.*, 999 F. Supp. 1120, 1131-1132 (N.D. Ill. 1998) (demand that the debtor immediately make payment to, or arrangements with, the creditor, was held to violate Section 1692g of the FDCPA); *Miller v. Payco-Gen. Am. Credits, Inc.*, 943 F.2d 482, 484-85 (4th Cir. 1991) (debt collector's letter demanding that Plaintiff respond "immediately," "now," and "today" undercut and overshadowed the 30-day period validation period).[3]

The Court also finds Defendant's assertion that it is excused (as "a waste of time") from sending Plaintiff a validation notice because it did not have Plaintiff's home or work addresses in California to be unavailing. While Plaintiff worked in California, she still owned her home in Plainfield,

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[3] The Court notes, too, that Defendant failed to contest or in any way dispute, that Mr. Romero's collection demand for payment "now" overshadowed, and thus rendered ineffectual any validation notice that had been sent.

Illinois and any mail sent to Plaintiff at her last known address in Plainfield was forwarded to her in California by her Plainfield, Illinois tenant (since returning to Illinois, Plaintiff continues to live there). Pl.'s Reply at 6. In addition, if Plaintiff had not continued to own her home in Plainfield, Defendant could have obtained a forwarding address from the post office. In any event, when Defendant initially contacted Plaintiff by telephone on January 9,2001, it received notification that same day that Plaintiff was represented by counsel, whose name and address were provided to Defendant at that time. Def's Mem., Ex. B at 3. Thus, in order to comply with the requirements of Section 1692g, Defendant could easily have sent the statutorily-required validation notice to Plaintiff in care of her counsel. Defendant, however, as seen, did nothing to comply with its written notice obligations under the FDCPA.

Therefore, the Court finds that Plaintiff is entitled to summary judgment as to Count III.

II. COUNT I

Plaintiff argues that Defendant violated Section 1692c(a)(3) of the FDCPA when Defendant's employee, Mr. Romero, contacted her at her place of employment regarding the debt she owed Dr. Que for dental services. 15 U.S.C. § 1692c(a)(3); Pl.'s Mem. at 6.

Plaintiff states that when Mr. Romeo contacted her on January 9, 2001 by telephone, she informed him that she could not talk to him while at work; however, he continued to ask her questions and made at least one additional phone

call to her while at work. *Id.* Defendant, on the other hand, contends that it did not violate Section 1692c(a)(3) in that Plaintiff did not tell Mr. Romero that her employer has a policy against such communication at work. Def.'s Mem. at 3. Moreover, Defendant argues that Plaintiff never communicated this prohibition in writing to Defendant. *Id.* Therefore, Defendant asserts that there is no allegation that Plaintiff ever told Defendant that her employer had a policy that she could not be contacted at her place of employment. *Id.*

Section 1692c(a)(3) of the FDCPA provides that "without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt-- . . . (3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication." 15 U.S.C. § 1692c(a)(3). Such action on the part of a debt collector constitutes a direct violation of the FDCPA. *United States v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370, 375, 388, 389, 391, and 393 (N.D. Tex. 1986), *aff'd as modified United States v. Central Adjustment Bureau, Inc.*, 823 F.2d 880 (5th Cir. 1987) (making calls to debtor's place of employment after being told not to do so by the debtor or employer is a violation of the FDCPA.) *See also U.S. v. ACB Sales & Service, Inc.*, 590 F. Supp. 561, 565 (D.Ariz.1984).

The Court agrees with Plaintiff and finds that Defendant violated Section 1692c(a)(3) when Defendant's employee, Mr.

Romero, contacted Plaintiff at her place of employment after she informed Mr. Romero that she could not talk to him, then, regarding the debt she owed to Dr. Que for dental services because she was at work. For instance, it is undisputed that Mr. Romero contacted Plaintiff at work; that Plaintiff told Mr. Romero that she could not talk to him while at work; that Plaintiff asked Mr. Romero for his phone number so that she could call him from home regarding the debt; that Mr. Romero continued to ask Plaintiff for personal information; that Plaintiff hung up on Mr. Romero; and that Mr. Romero placed at least one additional telephone call to Plaintiff's place of employment after she stated that she could not talk to him at work. (LR 56.1(a) St. PP 7-13; Def.'s Resp. to Pl.'s LR 56.1(a) St. PP 3-6.)

Moreover, respectfully, Defendant provides absolutely no support for its position that a debtor must provide written notice that the employer has a policy prohibiting such communications. There is no requirement in Section 1692c(a)(3) that a consumer provide a written notice to the debt collector that the consumer's employer has a policy of prohibiting such communications at work. *See Central Adjustment Bureau*, 667 F. Supp. at 375. Rather, all that is required is that the debtor inform the debt collector that the debt collector cannot make telephone calls to the debtor's place of employment regarding any alleged debt owed.

COUNT I (Part 2)

Plaintiff also alleges, in Count I, a violation under Section 1692c(b) of the FDCPA, in that, Mr. Romero spoke with Mr. Scholes (one of Plaintiff's coworkers) on the telephone. Pl.'s

Mem. at 7. In particular, Plaintiff asserts that when Mr. Scholes answered Plaintiff's telephone, Mr. Scholes informed Mr. Romero that Plaintiff was not available at which point Mr. Romero told Mr. Scholes to "tell Amanda to quit being such a fucking bitch" and then hung up. (LR 56.1(a) St. P 12.) Defendant, on the other hand, argues that while Mr. Romero spoke with Mr. Scholes when he answered Plaintiff's telephone, Mr. Romero did not discuss Plaintiff's debt with Mr. Scholes (despite the profane language). Def.'s Mem. at 4. Thus, Defendant contends that simply asking Plaintiff's co-worker who answered Plaintiff's telephone if she is available does not constitute a violation of Section 1692c(b) of the FDCPA because Plaintiff's debt was not discussed. *Id.*

Section 1692c(b) of the FDCPA provides that "a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector. 15 U.S.C. § 1692c(b). A debt collector who contacts third parties regarding a consumer's debt without the consent of the consumer violates the FDCPA. *Central Adjustment Bureau*, 667 F. Supp. at 375, 388, 391, 393, and 396. *See also Austin v. Great Lakes Collection Bureau, Inc.*, 834 F. Supp. 557, 559 (D.Conn.1993) (calling consumer's office and speaking with consumer's secretary was found to be a violation of the FDCPA).

The Court agrees with Defendant and finds that there is no evidence that Mr. Romero in communicating with Plaintiff's co-worker, Mr. Scholes discussed Plaintiff's debt. Rather,

Mr. Romero's conversation with Mr. Scholes was merely limited to inquiring as to Plaintiff's whereabouts and entailed the use of inappropriate, profane language. Accordingly, the Court denies Plaintiff's motion for summary judgment as it relates to Plaintiff's allegation that Defendant violated Section 1692c(b).[4]

III. COUNT II

Plaintiff argues that Mr. Romero's use of profane language in telling Mr. Scholes to "tell Amanda to quit being such a fucking bitch" violates Section 1692d(2) of the FDCPA. Pl.'s Mem. at 8. Defendant, however, asserts that Mr. Romero's use of such language does not violate Section 1692d(2) because he did not speak directly to Plaintiff; rather, Mr. Romero spoke to Plaintiff's co-worker, Mr. Scholes, who is a third party. Def.'s Mem. at 5.

Section 1692d of the FDCPA provides that "a debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. Moreover, Section 1692d(2) provides that "the use of obscene or profane language the natural consequence of which is to abuse the hearer or reader" is a violation of this section. 15 U.S.C. § 1692d(2). Moreover, as illustrated by case law, the use of profane language in the collection of a

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[4] The cases cited by Plaintiff, *Central Adjustment Bureau, supra*, and *Austin, supra,* are distinguishable. Unlike here, the debt collector's communications with third parties in those cases expressly referred in some way to the consumer's debt.

debt clearly and unequivocally violates Section 1692d(2). *Central Adjustment Bureau*, 667 F. Supp. at 376, 388, 390-394 (calling a debtor a "god damn liar," "low-lying bitch," "low-down son of a bitch," and telling debtors to "pay [the] damn bill," that the debt collector "didn't give a shit about [the consumer's] bills," and that the judge who hears consumer cases "didn't give a fuck about [a consumer's] situation were found to violate the FDCPA).

The Court agrees with Plaintiff and finds that Defendant's use of profane language violates Section 1692d(2) of the FDCPA. Defendant's employee, Mr. Romero, called and talked to Plaintiff about the subject debt. Then, about fifteen minutes later, Mr. Romero violated Section 1692d(2) of the FDCPA when he left the described profane message about Plaintiff with her co-worker, Mr. Scholes. Mr. Romero's obvious intent, and the reasonable assumption, was that Mr. Scholes would relay Mr. Romero's profane message to Plaintiff, which Mr. Scholes immediately did when Plaintiff returned to her desk some fifteen minutes later. The profane message to Plaintiff from Mr. Romero, clearly, was directly tied to Mr. Romero's debt collection phone call to Plaintiff fifteen minutes before. Therefore, the Court finds that Mr. Romero's use of profane and obscene language in connection with the collection of the debt had the natural consequence of harassing, oppressing or abusing Plaintiff, in violation of Section 1692d(2).

Accordingly, the Court finds that Plaintiff is entitled to summary judgment as to Count II.

CONCLUSION[5]

Based on the foregoing, Plaintiff's motion for summary judgment on the issue of liability is granted as to Counts II, III, and Part of Count I and denied as to Part of Count I.

ENTER:

/s/ _____
IAN H. LEVIN
United States Magistrate Judge

Dated: January 4, 2002

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[5] In view of the Court's ruling herein, it is deemed unnecessary to consider Plaintiff's argument that Defendant failed to comply with Local Rule 56.1(b).

APPENDIX C

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge: Ian H. Levin

CASE NUMBER: 01 C 1034 - 01 C 5896
DATE: 2/7/2002
CASE TITLE: Horkey vs. J.V.D.B. & Associates Inc.
Turner vs. J.V.D.B. & Associates Inc.

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:
Motion for summary judgment and reconsideration of the memorandum opinion and order of 1/4/02.

DOCKET ENTRY:

(1) [X] Filed motion of [use listing in "Motion" box above.]

(5) [X] Status hearing held and continued to 4/17/2002 at 10:15 A.M.

(10) [X] [Other docket entry] **Motion is granted as to the motion for summary judgment as to count I (part 2) and denied as to the motion to reconsider**

memorandum opinion and order of 1/4/02. Discovery cut-off by 4/17/02.

[X] No notices required, advised in open court.

Courtroom deputy's initials: SM
Date/time received in
central Clerk's Office: Filed February 8, 2002
Date docketed: 2/11/02
Docketing deputy initials: AIR
Document Number: 21

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK — Office of the Clerk

Paul D Lawent
Law Offices of Paul D. Lawent
330 South Wells Street
Suite 1310
Chicago, IL 60606

Case Number: 1:01-cv-01034

Title: Horkey v. J V D B & Assc Inc

Assigned Judge: Honorable Ian H. Levin

MINUTE ORDER of 7/29/02 by Hon. Ian H. Levin : Bench trial held. Judgment is entered against the defendant J.V.D.B. & Associates and for the plaintiff Amada Horkey in the amount of $1000.00 in statutory damages and $350.00 in actual damages, including attorneys' fees and costs subject to the Court's approval for the reasons stated of record. terminating case Mailed notice

This docket entry was made by the Clerk on July 30, 2002.

ATTENTION: This notice is being sent pursuant to Rule 77 (d) of the Federal Rules of Civil

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 01 C 1034

[Filed July 29, 2002]

Horkey	)
	)
v.	)
	)
J.V.D.B. & Associates, Inc.	)
	)

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

[X] Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Judgment is against the defendant J.V.D.B. & Associates and for the plaintiff Amada Horkey in the amount of $1000.00 in statutory damages and $350.00 in actual damages, including attorney's fees and costs.

Michael W. Dobbins, Clerk of Court

Date: 7/29/2002

/s/ _____
Mervin Myvett, Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK — Office of the Clerk

Paul D Lawent
Law Offices of Paul D. Lawent
330 South Wells Street
Suite 1310
Chicago, IL 60606

Case Number: 1:01-cv-01034

Title: Horkey v. J V D B & Assc Inc

Assigned Judge: Honorable Ian H. Levin

MINUTE ORDER of 7/29/02 by Hon. Ian H. Levin : Bench trial held. The minute order and AO 450 of 7/29/02 are hereby corrected as follows: Judgment is entered against the defendant J.V.D.B. & Associates and for the plaintiff Amada Horkey in the amount of $1000.00 in statutory damages and $350.00 in actual damages, plus attorneys' fees and costs subject to the Court's approval for the reasons stated of record. Mailed notice

This docket entry was made by the Clerk on August 2, 2002.

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